FILED BY CLERK
FEB 25 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STEPHEN BISHOP, Petitioner/Appellant, v. ARIZONA DEPARTMENT OF CORRECTIONS and DORA B. SCHRIRO, Respondents/Appellees.	2 CA-HC 2009-0002 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200802055

Honorable William J. O'Neil, Judge

AFFIRMED

Stephen Bishop — Buckeye
In Propria Persona

Terry Goddard, Arizona Attorney General
By Michael E. Gottfried — Phoenix
Attorneys for Respondents/Appellees

K E L L Y, Judge.

¶1 Appellant Stephen Bishop challenges the trial court's denial of his petition for a writ of habeas corpus, in which he had requested either release or a hearing on the status of his prison records. Bishop maintains the trial court erred in summarily dismissing his petition without a hearing. Finding no error, we affirm.

Background

¶2 Bishop was convicted of five counts of armed robbery, nine counts of kidnapping, one count of aggravated assault and one count of theft arising from a 1979 robbery. He was sentenced to consecutive and concurrent sentences totaling eighty-four years' imprisonment. This court affirmed Bishop's convictions and sentences. *State v. Bishop*, 137 Ariz. 5, 667 P.2d 1331 (App. 1983).

¶3 Bishop filed a petition for a writ of habeas corpus in 2008, alleging "his prison files have been purged and manipulated so much that ADOC [(Arizona Department of Corrections)] can no longer provide for his care and degree of treatment needed."[1] The trial judge initially ordered a hearing on the matter, but noted he had a potential conflict on the case. After the state filed a notice requesting the judge to disqualify himself, the assigned judge recused and the case was reassigned to a second trial judge. The state subsequently moved for reconsideration of the recused judge's

[1]In the 1980s, Bishop had advised ADOC that other prisoners were concealing weapons, which endangered corrections officers. An entire cell block, including many members of the Arizona Aryan Brotherhood, was required to submit to body cavity searches. Bishop was identified in a subsequent court hearing as the source of this information. ADOC created a DNHW (do not house with) list of inmates who might seek to retaliate because of the searches. This list, which apparently was stored in a computer database, was lost at some point but replaced after a paper copy was located in sealed court records.

order granting a hearing, arguing it was unnecessary because Bishop was not entitled to habeas corpus relief. The trial court granted the motion, dismissing Bishop's petition. This appeal followed.

Discussion

¶4 In several different arguments, Bishop maintains the trial court should have granted his petition for a writ of habeas corpus. "The decision whether to issue a writ of habeas corpus is entrusted to the sound discretion of the trial court, and we will not disturb the trial court's decision unless we see an abuse of that discretion." *State v. Cowles*, 207 Ariz. 8, ¶ 3, 82 P.3d 369, 370 (App. 2004).

¶5 Bishop argues first that if the state had not moved to recuse the trial judge initially assigned to this case "a different outcome would have been reached." To the extent Bishop thereby argues that the second judge was either without authority to reconsider the motion or that the judge was biased against him, we reject his arguments. Although "a superior court judge should exercise caution when considering a motion that has already been denied by another judge," a trial judge does have "jurisdiction to reconsider the motion unless the first decision was a final judgment." *Dunlap v. City of Phoenix*, 169 Ariz. 63, 66, 817 P.2d 8, 11 (App. 1990). In addition, a party must show more than contrary rulings to overcome our presumption that a trial judge is without bias. *See State v. Smith*, 203 Ariz. 75, ¶ 13, 50 P.3d 825, 829 (2002) (judges presumed free from bias); *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977) ("It is generally conceded that the bias and prejudice necessary to disqualify a judge must arise

from an extra-judicial source and not from what the judge has done in his participation in the case.").

¶6 Bishop's primary argument on appeal, however, is that by losing certain records from his files,[2] ADOC has deprived him of valid parole board and other reviews and put his life in danger, thereby creating an "illegal restraint" entitling him to habeas corpus relief. As the state argues, however, the loss of records is "not grounds for release from prison."

¶7 "[T]he purpose of a writ of habeas corpus is to test the legality and correctness of a prisoner's judgment and confinement." *Griswold v. Gomes*, 111 Ariz. 59, 62, 523 P.2d 490, 493 (1974). Pursuant to A.R.S. § 13-4121, "[a] person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may petition for and prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." But, habeas corpus is not the "appropriate means to order something less than 'absolute release.'" *Long v. Ariz. Bd. of Pardons & Parole*, 180 Ariz. 490, 494, 885 P.2d 178, 182 (App. 1994), *quoting Escalanti v. Dep't of Corr.*, 174 Ariz. 526, 527 n.1, 851 P.2d 151, 152 n.1 (App. 1993).

¶8 Even accepting as true Bishop's allegations that ADOC has lost some of his records, he has not shown that the loss of the records would entitle him to release, and habeas corpus is therefore inappropriate. *See id.* Indeed, the only argument we can discern suggesting the loss of the files might entitle him to some sort of release relates to

[2]Bishop mentions his "Do Not House With" list specifically and he also argues that the lost records were "not just [the] do not house list." He does not, however, specify what other documents were purportedly lost or "san[i]tized."

his parole hearings and "disproportionality hearing."[3] As the state points out, however, a prisoner is not guaranteed parole. *See Foggy v. Ariz. Bd. of Pardons & Paroles*, 108 Ariz. 470, 472, 501 P.2d 942, 944 (1972) ("Whether a prisoner is granted parole is a matter of grace and not a matter of right."). And more importantly, because parole is not an absolute release,[4] the trial court was not authorized to employ a writ of habeas corpus as a means of paroling Bishop, even if he had been entitled to parole. *See Long*, 180 Ariz. at 494, 885 P.2d at 182.

¶9 Likewise, our supreme court has stated that in Arizona, "'[t]he writ of habeas corpus may not be utilized for the purpose of correcting alleged mistreatment of a prison inmate by prison authorities subsequent to valid judgment and commitment.'" *Foggy v. State ex rel. Eyman*, 107 Ariz. 532, 533-34, 490 P.2d 4, 5-6 (1971), *quoting Application of Dutton*, 95 Ariz. 96, 97, 387 P.2d 799, 800 (1963). Bishop's allegations here are akin to "mistreatment of a prison inmate" and a writ of habeas corpus may not, therefore, be used as a vehicle for relief. *Id.*

¶10 Bishop also maintains that if habeas corpus relief was inappropriate, the trial court should have amended his petition to one for special action relief. Although

[3]"To mitigate the disparity in sentences between those who committed crimes before and after 1994, the legislature enacted the Disproportionality Review Act (the 'DRA'), which authorized the Arizona Board of Executive Clemency to recommend to the governor commutations of sentences for certain pre-1994 offenses." *Galaz v. Stewart*, 207 Ariz. 452, ¶ 4, 88 P.3d 166, 167 (2004), *citing* 1994 Ariz. Sess. Laws, ch. 365, § 1(F)(1).

[4]"[P]arole, 'is in legal effect imprisonment.'" *Long*, 180 Ariz. at 494, 885 P.2d at 182, *quoting Mileham v. Ariz. Bd. of Pardons & Paroles*, 110 Ariz. 470, 472, 520 P.2d 840, 842 (1974).

there may be circumstances in which it is appropriate to treat the petition as one for special action relief, *see Bustamonte v. Ryan*, 175 Ariz. 327, 328, 856 P.2d 1205, 1206 (App. 1993), Bishop has presented no persuasive reason to do so here. Indeed, as the state points out, the relief from prison that Bishop sought could be granted only through a writ of habeas corpus. Thus, although Bishop's petition raised issues inappropriate for habeas corpus relief, he was in fact seeking such relief and not special action relief. *See id.* (where primary relief sought was access to law library, trial court should have converted petition for writ of habeas corpus to special action).

¶11 Additionally, Bishop suggests he may be entitled to release because ADOC has not "properly calculated his time." He does not, however, explain how his sentences could be calculated in such a way as to entitle him to release. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Bishop was sentenced to eighty-four years' imprisonment when he was convicted in 1981 and was sentenced in 1982 to a total of five years' imprisonment for convictions arising from an attempted escape. A "Time Computation Program Specialist" for ADOC averred Bishop will be eligible for parole from the twenty-eight-year sentence he is currently serving in 2012; if granted, he would then begin serving another thirty-five-year sentence, followed by his final five-year term. Thus, based on the uncontroverted evidence presented to the trial court, we cannot say it abused its discretion in finding that Bishop is not entitled to release at this time, denying his request for a hearing, and dismissing the petition.

Disposition

¶12 The judgment of the trial court is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge